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Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

FRANCIS W. SPLITTORFF
Petitioner,

v.

JERRY AIGNER, PAM AIGNER, BEVERLY CHILDS, AND WARRICK COUNTY INDIANA
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I

Did the Indiana Court of Appeals' opinion below contravene the authority of this Court's opinion in *Jones v. Flowers*, 547 U.S. ___ 126 S.Ct.____ 164 L.Ed.2d. 415, 426 (2006), other State Courts, and various Federal Circuit Courts of Appeal in conformity with the *Jones* opinion.

II

Did the Indiana Trial Court and Indiana Court of Appeals' violate Francis W. Splittorff's (hereinafter "Splittorff") procedural due process rights by so readily finding implied waiver of constitutional rights.

III.

Did the Indiana Trial Court and the Indiana Court of Appeals render a portion of the Indiana Tax Sale Statute, specifically I.C. 6-1.1-25-4.6(h), unconstitutional on procedural due process and equal protection grounds by holding that it strictly limits one whose property has been sold at tax sale to the sole remedy of a sixty (60) day window of time to take an appeal, directly from issuance of the tax deed while affording other litigants broader appellate rights.

PARTIES TO THE PROCEEDINGS

Petitioner is Francis W. Splittorff. Respondents are Jerry Aigner, Pam Aigner and Beverly Childs, who were plaintiffs in the Trial Court and Warrick County, which is a political subdivision of the State of Indiana. Respondents were appellees in the Indiana Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

No party to the proceedings is a corporation.

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ON PETITION FOR WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner Francis .W. Splittorff (hereinafter "Splittorff"), by counsel Robert R. Faulkner, respectfully petitions for a writ of certiorari to review the judgment of the Indiana Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Indiana Court of Appeals is not reported. It is reproduced in Appendix A at App. p. 2. The July 2, 2007 order of the Indiana Court of Appeals denying rehearing simply stated, "APPELLANTS' PETITION FOR REHEARING DENIED" and is not reproduced in the appendix due to its brevity. The order of the Indiana Supreme

Court denying Transfer is reproduced in Appendix D at App. p. 23. The opinions of the Trial Court granting Respondents' Motions for Summary Judgment are reproduced in Appendix B and Appendix C at App. p. 17 and p. 19 respectively..

JURISDICTION

The Indiana Court of Appeals entered its opinion on April 26, 2007. Petitioner then timely filed a Petition for Rehearing on May 25, 2007 which was denied on July 2, 2007. Petitioner then filed a timely Petition to Transfer to the Indiana Supreme Court on August 1, 2007 which was denied on November 1, 2007. Petitioner has filed this Petition within ninety (90) days as required by Supreme Court Rule 13(1). Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 1257.

The constitutional issues discussed herein were raised by Splittorff in his Amended Cross-Claim against Warrick County and in his filings in the summary judgment litigation The Trial Court did not address those arguments, (Appendix B and C hereto). The constitutional issues discussed herein were raised by Splittorff at the appellate stage in his Brief of Appellent and further discussed and argued in his Reply Brief of Appellant, Petition for Rehearing and Petition to Transfer the Indiana Supreme Court. Neither the Indiana Court of Appeals nor the Indiana Supreme Court addressed

the merits of Splittorff's constitutional issues, (Appendix A and D hereto).

The provisions of 28 USC § 2403 (b) Pursuant to Rule 29.4 (c) of the rules of the United States Supreme Court, the Attorney General of the State of Indiana is being served with three (3) copies of this Petition and Appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5 to the constitution of the United States states as follows:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Section 1 of the Amendment 14 to the Constitution of the United States states as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The primary Indiana Statute at issue herein is I.C. 6-1.1-25-4.6 as follows:

Petition to court for issuance of tax deed; court orders; refunds; effects of tax deed; appeal

Sec. 4.6. (a) After the expiration of the redemption period specified in section 4 of this chapter but not later than six (6) months after the expiration of the period of redemption:

(1) the purchaser, the purchaser's assignee, the county executive, or the purchaser of the certificate of sale under IC 6-1.1-24 may; or

(2) in a county where the county auditor and county treasurer have an agreement under section 4.7 of this chapter, the county auditor shall, upon the request of the purchaser or the purchaser's assignee; file a verified petition in the same court and under the same cause number in which the judgment of sale was entered asking the court to direct the county auditor to issue a tax deed if the real property is not redeemed from the sale. Notice of the filing of this

petition shall be given to the same parties and in the same manner as provided in section 4.5 of this chapter, except that, if notice is given by publication, only one (1) publication is required. The notice required by this section is considered sufficient if the notice is sent to the address required by section 4.5(d) of this chapter. Any person owning or having an interest in the tract or real property may file a written objection to the petition with the court not later than thirty (30) days after the date the petition was filed. If a written objection is timely filed, the court shall conduct a hearing on the objection.

(b) Not later than sixty-one (61) days after the petition is filed under subsection (a), the court shall enter an order directing the county auditor (on the production of the certificate of sale and a copy of the order) to issue to the petitioner a tax deed if the court finds that the following conditions exist:

(1) The time of redemption has expired.

(2) The tract or real property has not been redeemed from the sale before the expiration of the period of redemption specified in section 4 of this chapter.

(3) Except with respect to a petition for the issuance of a tax deed under a sale of the certificate of sale on the property under IC 6-1.1-24-6.1, all taxes and special assessments, penalties, and costs have been paid.

(4) The notices required by this section and section 4.5 of this chapter have been given.

(5) The petitioner has complied with all the provisions of law entitling the petitioner to a deed.

The county auditor shall execute deeds issued under this subsection in the name of the state under the county auditor's name. If a certificate of sale is lost before the execution of a deed, the county auditor shall issue a replacement certificate if the county auditor is satisfied that the original certificate existed.

(c) Upon application by the grantee of a valid tax deed in the same court and under the same cause number in which the judgment of sale was entered, the court shall enter an order to place the grantee of a valid tax deed in possession of the real estate. The court may enter any orders and grant any relief that is necessary or desirable to place or maintain the grantee of a valid tax deed in possession of the real estate.

(d) Except as provided in subsections (e) and (f), if:

(1) the verified petition referred to in subsection (a) is timely filed; and

(2) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the failure of the petitioner under subsection (a) to fulfill the notice requirement of subsection (a);

the court shall order the return of the amount, if any, by which the purchase price exceeds the minimum bid on the property under IC 6-1.1-24-5(e) minus a penalty of twenty-five percent (25%) of that excess. The petitioner is prohibited from participating in any manner in the next succeeding tax sale in the county under IC 6-1.1-24. The county auditor shall deposit

penalties paid under this subsection in the county general fund.

(e) Notwithstanding subsection (d), in all cases in which:

(1) the verified petition referred to in subsection (a) is timely filed;

(2) the petitioner under subsection (a) has made a bona fide attempt to comply with the statutory requirements under subsection (b) for the issuance of the tax deed but has failed to comply with these requirements;

(3) the court refuses to enter an order directing the county auditor to execute and deliver the tax deed because of the
failure to comply with these requirements; and

(4) the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24 files a claim with the county auditor for refund not later than thirty (30) days after the entry of the order of the court refusing to direct the county auditor to execute and deliver the tax deed; the county auditor shall not execute the deed but shall refund the purchase money minus a penalty of twenty-five percent (25%) of the purchase money from the county treasury to the purchaser, the purchaser's successors or assignees, or the purchaser of the certificate of sale under IC 6-1.1-24. The county auditor shall deposit penalties paid under this subsection in the county general fund. All the delinquent taxes and special assessments shall then be reinstated and recharged to the tax duplicate and collected in the same manner as if the property had

not been offered for sale. The tract or item of real property, if it is then eligible for sale under IC 6-1.1-24, shall be placed on the delinquent list as an initial offering under IC 6-1.1-24.

(f) Notwithstanding subsections (d) and (e), the court shall not order the return of the purchase price or any part of the purchase price if:

(1) the purchaser or the purchaser of the certificate of sale under IC 6-1.1-24 has failed to provide notice or has provided insufficient notice as required by section 4.5 of this chapter; and

(2) the sale is otherwise valid.

(g) A tax deed executed under this section vests in the grantee an estate in fee simple absolute, free and clear of all liens and encumbrances created or suffered before or after the tax sale except those liens granted priority under federal law, and the lien of the state or a political subdivision for taxes and special assessments that accrue subsequent to the sale. However, the estate is subject to all easements, covenants, declarations, and other deed restrictions and laws governing land use, including all zoning restrictions and liens and encumbrances created or suffered by the purchaser at the tax sale. The deed is prima facie evidence of:

(1) the regularity of the sale of the real property described in the deed;

(2) the regularity of all proper proceedings; and

(3) valid title in fee simple in the grantee of the deed.

(h) A tax deed issued under this section is incontestable except by appeal from the order of the

court directing the county auditor to issue the tax deed filed not later than sixty (60) days after the date of the court's order

STATEMENT OF THE CASE

A. Facts

Petitioner seeks review of the ruling of the Indiana Court of Appeals holding that Splittorff had waived his right to challenge any deficiencies in issuance of a tax deed for his property by failing to comply with sixty (60) day time limitation and specific procedure imposed by Indiana Statute.

This matter was decided on Summary Judgment by the Trial Court. Splittorff had designated evidence to the court as to the following: Splittorff's homestead had been divided into two separate Parcel Identification Numbers, which under Indiana Statute are assigned by the Warrick County Auditor. Splittorff had been having some difficulty in getting Warrick County to send tax bills to his correct address for the subject property. As early as April 1998 Warrick County was sending tax bills and notices for a different parcel to his correct address at 7488 Jenner Road, Chandler, Indiana, 47610. On August 7, 2000 Splittorff submitted an address correction request to the Warrick County Auditor for the subject property to make the proper address for purposes of tax bills 7488 Jenner Road, Chandler, IN 47610. Splittorff was unsuccessful at

getting the County Treasurer and Auditor to send tax bills to the correct address. Notwithstanding the address correction request submitted on August 7, 2000, in 2001 the tax statements for the 2000 pay 2001 taxes were mailed to the former owners in St. Charles, Missouri. During this general period of time Splittorff would periodically come to the Warrick County Auditor's office and to the Warrick County Treasurer's office to ascertain the status of tax obligations and would pay any obligations discovered to be owed. On or about August 7, 2000 Splittorff redeemed the subject property from a prior tax sale paying to Warrick County six hundred twenty four dollars fifty cents ($624.50). The redemption amount was $489.03 and Splittorff believed the additional amounts paid above and over the $489.03 were to be applied to any installments then due and amounts which had been assessed but not yet due which would have been sufficient to pay at least two additional installments above and over what Splittorff had believed the redemption amount to be.

Prior to the 2001 Warrick County Tax Sale Splittorff did not receive tax bills from Warrick County at his mailing address of 7488 Jenner Road leading up to the tax sale of his property. On August 31, 2001 Warrick County filed application for judgment and order of sale for Splittorff's property among others. At approximately the general time period of the 2001 Tax Sale at which the Respondents/Plaintiffs purchased a tax sale

certificate to the subject property an individual who identified herself as Marilyn from the Warrick County Treasurer's Office contacted Splittorff and left a message on Splittorff's answering machine indicating that the taxes for the subject property had been paid and she was not certain where the tax bills had been sent. Respondents/Plaintiffs purchased a tax sale certificate to Splittorff's property at the September 26, 2001 Warrick Tax Sale. On August 27, 2002 plaintiffs filed their verified petition for tax deed. Splittorff did not receive any notice from the Warrick County Clerk's office concerning the tax sale of the subject real estate. On October 1, 2002 the Warrick Circuit Court issued the first of two documents captioned "Order for Tax Deed" for the real estate. On October 8, 2002 the Warrick County Auditor issued a "Tax Deed" to the subject property. On December 4, 2002 the Court entered its second document captioned "Order for Tax Deed" identical to order entered on October 1, 2002.

As of April 17, 2003 Warrick County still had Lois L. Brooks of St. Charles, Missouri listed as the owner of the subject real estate. On September 19, 2003 Edward W. Johnson on behalf of Splittorff sent to the Warrick County Auditor Correspondence accompanying a payment of $10,500.00. In making this redemption it was Splittorff's understanding and belief that the redemption was applicable to the improvements and the real estate which is the subject of this action.

B. Statement of Proceedings and Disposition in the Courts Below

This matter was initiated with the filing of the Plaintiffs' Complaint to Quiet Title and Possession on December 4, 2003 in the Warrick Superior Court. On January 28, 2004 Appellant Splittorff filed his answer, affirmative defense, counterclaim and cross claim. On February 9, 2004 Plaintiffs' filed their answer to Splittorff's counterclaim. On April 22, 2004 the matter was venued to the Pike Circuit Court. On February 21, 2005 defendant Warrick County filed its answer to Splittorff's cross claim. On March 8, 2005 Warrick County filed for leave to amend its answer to Splittorff's cross claim which was granted on March 14, 2005. On March 21, 2005 Warrick County filed its first amended answer to Splittorff's cross claim. On March 25, 2005 Warrick County filed its motion for partial summary judgment and supporting materials as to Splittorff's cross claim. On April 21, 2005 Splittorff filed a motion for leave to amend his cross claim which was granted on April 22, 2005. On May 23, 2005 Warrick County filed its answer to Splittorff's amended cross claim. Pursuant to extension of time granted by the Trial Court, Splittorff filed his response to Warrick County's motion for summary judgment, motion to publish depositions and affidavit of Francis Splittorff on June 20, 2005. On June 20, 2005 the Court granted Splittorff's motion to publish depositions and ordered that the

depositions of Splittorff, Jerry Aigner and Leslie Childs be published. On June 28, 2005 Warrick County filed it reply brief in support of its motion for summary judgment as to Splittorff's cross claim. On January 30, 2006 Warrick County filed its second motion for summary judgment. As Warrick County's second motion for summary judgment was not signed it was mailed back to Warrick County's counsel and refiled on February 9, 2006. Having been granted an extension of time to respond to Warrick County's second motion for summary judgment, Splittorff filed his response thereto and Splittorff's motion for summary judgment on March 2, 2006. On March 22, 2006 Plaintiffs filed their motion for summary judgment and supporting materials. On March 22, 2006 Warrick County filed its reply to Splittorff's response to Warrick County's second motion for summary judgment and Warrick County's supplemental designation of evidence. On April 24, 2006 Splittorff filed his response to Plaintiffs' motion for summary judgment. On May 19, 2006 the Trial Court conducted a hearing on all pending motions. On May 22, 2006 the Trial Court granted Warrick County's motions for summary judgment and the plaintiffs' motion for summary judgment. On June 13, 2006 the court entered its order quieting title and possession of real estate. On June 19, 2006 Splittorff filed his notice of appeal and motion for stay of order. On July 13, 2006 the Trial Court Clerk filed her notice of completion of clerk's record. After the parties filed their respective briefs, on April 26, 2007 the Indiana Court of

Appeals rendered its non-published opinion. On May 25, 2007 Splittorff filed his Petition for Rehearing which was denied on July 2, 2007. Splittorff then filed a timely Petition to Transfer to the Indiana Supreme Court on August 1, 2007 which was denied on November 1, 2007.

REASONS FOR GRANTING OF THE PETITION

A. The Indiana Court of Appeals' opinion below contravened and effectively repudiated the authority of this Court's opinion in *Jones v. Flowers*, 547 U.S. ___ 126 S.Ct.____ 164 L.Ed.2d. 415, 426 (2006) and other Federal Circuit Courts of Appeal in conformity with the *Jones* pinion.

The only evidence designated to the Trial Court of any notice given Splittorff prior to the tax sale was a copy of one unclaimed certified mail receipt. Before taking an action which will affect an interest in life, liberty or property protected by the due process of the Fourteenth Amendment the State must provide notice reasonably calculated under the circumstances to apprise interested parties of the pendancy of the action and afford them an opportunity to present their objections. *Yoder v. Elkhart County Auditor*, 632 N.E.2d 369, 372 (Ind. 1994)(Trans.Den.)(Cert.Den.), *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795, 77 L.Ed.2d 180, 185, 103 S.Ct. 2706 (1983). Even if Warrick County had given notice by publication that, of

itself, is insufficient, *Id.* Published notice alone in the absence of actual notice is no more than feint, *Id.* Noting many State and Federal Courts have reached the same conclusion, this Court has specifically held that when the government learns its attempt at notice has failed, due process requires the government to do something more before real property may be sold at tax sale. *Jones v. Flowers*, 547 U.S. ___ 126 S.Ct.____ 164 L.Ed.2d. 415, 426 (2006)(citations omitted). Chief Justice Roberts then goes on to point out that Indiana law is not in accord with that holding. *Id.* (citing *Elizondo v. Read*, 588 N.E.2d 501, 504 (Ind. 1992)). The proceedings below clearly illustrate that the Courts of the State of Indiana do not adhere to this Court's holding in the *Jones v. Flowers* case cited above. The members of this Court commented in *Jones* that they would not think that one who actually desired to inform a real property owner of an impending tax sale of his property would do nothing more when a certified letter sent to the owner is returned unclaimed. *Id.* 164 L.Ed.2d. at 427. This Court flatly rejected as sufficient notice that consisted of no more than unclaimed certified mail. *Jones v. Flowers*, 164 L.Ed.2d 428. There, two different notices were sent by certified mail, came back unclaimed and notice was given by publication. *Id.* 164 L.Ed2d at 423. This was found to be a due process violation. *Id.* 164 L.Ed2d at 434, (see also *Luessehnop v. Clinton County, New York*, 466 F.3d 259, 270 (2nd Cir. 2006) applying *Jones v. Flowers*) and *Plemons v. Gale*, 396 F.3d 569, 573 (4th Cir. 2004)). State courts have

reached the same result. *Bank of America v. Giant*, 93 Cal.Rptr. 626, 631-632 (Cal.Ct.App. 2000), *St. George Antiochian Christian Church v. Aggarwal*, 603 A.2d 484, 490 (Md. 1992). The lack of notice to Splittorff before selling his property at tax sale violated Splittorff's due process rights.

The Indiana Court of Appeals adopted the Respondents' argument that since Splittorff may have had some familiarity with the tax sale process he should have known the property might be subject to being sold or had been sold and therefore failure of notice was irrelevant. Splittorff in response pointed out that any familiarity he may have had with the tax sale process arose directly out of Warrick County's continued, long standing refusal to send tax bills and notices to his correct address. Further, Respondents' argument in this regard has been universally rejected by this and many other courts. A party's ability to take steps to safeguard its interests does not relieve the state of its constitutional obligations. *Jones v. Flowers*, 164 L.Ed.2d at 429, *Mennonite Board of Missions v. Adams*, 462 U.S. at 799, 77 L.Ed.2d at 188, *Plemons v. Gale*, 396 F.3d at 574, *Schwartz v. Dey*, 665 S.W.2d 933, 935 (Mo.banc. 1984), *O'Brien v. Port Lawrence Title and Trust Company*, 688 N.E.2d 1136, 1141 (Ohio.Com.Pl. 1997), *Grobien v. Lombardy*, 765 F.Supp. at 860. Splittorff's or any other taxpayer's familiarity or lack of familiarity with the tax sale process does not excuse failure of constitutionally required notice.

It is also apparent that one basis for the court's opinion was a belief, with the benefit of 20-20 hindsight, that Splittorff should have done more to save his property from tax sale. While Splittorff disputed that proposition, the fact that an owner should have been more diligent does not excuse constitutionally inadequate notice. *Jones v. Flowers,* 164 L.Ed. 2d at 430.

Even if Splittorff, as argued by Respondents below, received notice in late June 2002, that did not constitute adequate notice nor did it resurrect a void tax sale. As noted above, notice "before" a tax sale is a pre-requisite to the validity of a tax sale. Further, as argued extensively in the Indiana state courts, the purported notice provided in late June 2002 was factually inaccurate and misleading by among other things misrepresenting the redemption amount and the date the petition for tax deed would be filed.

In addition, notice sent in late June 2002 notifying of a September 27, 2002 redemption deadline does not adequately provide the opportunity to redeem within one year as provided by the tax sale statute at I.C. 6-1.1-25-4(a). Notice of the redemption period given well after the tax sale, which has the effect of abbreviating the statutory period of redemption constitutes a due process violation, *Oneida Indian Nation v. Oneida County,* 423 F.Supp.2d 285, 290 (N.D.N.Y. 2006), *Oneida*

Indian Nation of New York v. Madison County, 401 F.Supp. 219, 230 (N.D.N.Y. 2005). Giving such belated notice of right of redemption after the right has become burdened with interest, penalties, attorney fees, title research fees and Court costs associated with redemption or resisting the sale effectively deprives the taxpayer of the right itself and makes the right of redemption a mere shibboleth, *In Re: Pontes*, 310 F.Supp.2d 447, 458 (D.R.I. 2004). It matters not that private parties are charged with giving such "notice" rather than the County as their participation in the tax sale process make them government actors, *Plemons v. Gale*, 396 F.3d at 572 n.3.

It appears that Indiana Courts have never recognized a concept which should be intuitive and which other jurisdictions have specifically recognized and articulated, that the primary purpose of the tax sale law is not to divest owners of their property, but to provide a method for collecting taxes, *Sonderman v. Remington Construction Company Inc.*, 603 A.2d 1, 8 (N.J. 1992). Justice Flaherty of the Pennsylvania Supreme Court articulated this principle very eloquently stating:

> "Somehow, over the years, taxing authorities have lost sight of the fact that it is a momentous event under the United States and Pennsylvania Constitutions when a government subjects a citizen's property to forfeiture for non-payment of taxes. We have

> had occasion before to note that we hold no brief with wilful, persistent and long standing tax delinquents, but at the same time, we have also observed that the "strict provisions of the Real Estate Tax Sale Law were never meant to punish taxpayers who omitted through oversight or error...to pay their taxes." *Ross Appeal*, 366 Pa. 100, 107, 76 A.2d 749, 753 (1950). As this Court stated in *Hess v. Westerwick*, "the purpose of tax sales is not to strip the taxpayer of his property but to insure the collection of taxes." 366 Pa. 90, 98, 76 A.2d 745, 748 (1950)., *Tracy v. County of Chester, Tax Claim Bureau*, 489 A.2d 1334, 1339 (Pa. 1985).

If Justice Flaherty had been presiding in this case, it would not be necessary for Splittorff to ask this court to grant Certiorari to uphold this fundamental principle.

B. The Indiana Trial Court and Indiana Court of Appeals' violated Splittorff's procedural due process rights by so readily finding he had impliedly waived substantial constitutional rights

Splittorff had objected extensively in the Trial Court to the unconstitutionality of the Appellees' actions. The unconstitutionality of notice was further raised and discussed in his Brief of Appellant. Notwithstanding this record the Indiana Court of Appeals brushed aside Splittorff's

constitutional claims as waived. The law does not presume the waiver of constitutional rights, *Lake James Fire Department, Inc. v. Burke County N.C.* 149 F.3d 277, 280 (4th Cir. 1998), *Gete v. I.N.S.*, 121 F.3d 1285, 1293 (9th Cir. 1997). There is a presumption against waiver of due process rights, *Johnson v. U.S. Department of Agriculture,* 734 F.2d 74, 784 (11th Cir. 1984), *Monsanto v. Ruckelshaus,* 753 F.2d 649, 654 (8th Cir. 1985). An effective waiver of a constitutional right has been expressed as an "intentional relinquishment or abandonment of a known right or privilege", *Atorie Air v. F.A.A.*, 942 F.2d 954, 959 (5th Cir. 1991). A waiver of a due process right must be voluntarily, intelligently and knowingly made, *Martin v. Amoco Oil Co.*, 679 N.E.2d 139, 144-145 (Ind.Ct.App. 1997)(affirmed in relevant part, *Martin v. Amoco Oil Co.*, 696 N.E.2d 383, 386 (Ind. 1998)), *Nose v. Attorney General of U.S.*, 993 F.2d 75, 79 (5th Cir. 1993), *Lake James Fire Department, Inc.* 149 F.3d at 280. In both criminal and civil cases due process rights may ordinarily be waived only if it is established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent, *Gete*, 121 F.3d at 1293. A claimed waiver of the constitutional right to due process is examined with the strictest of scrutiny, *Atorie Air v. F.A.A.*, 942 F.2d at 959. Courts indulge every reasonable presumption against waiver, *Id, Gete v. I.N.S.*, 121 F.3d at 1293, *Nose v. Attorney General of U.S.* 993 F.2d at 79. The record here contains no evidence that Splittorff waived due process or other constitutional rights. The 5th

Circuit specifically rejected the Indiana Court of Appeals' approach in its reliance upon the legal fiction of implied waiver of due process rights to cure constitutional defects in notice. *Davis Oil Co. v. Mills*, 873 F.2d 774, 788 (5th Cir. 1989). This court should grant Certiorari and incorporate such a holding in its opinion.

Splittorff's challenge to the jurisdiction of the tax sale Court to enter its order for issuance of tax deed and to the validity of the order and deed were also rejected as waived by the Indiana Court of Appeals. The concept of jurisdiction was inherently, directly implicated by Splittorff's objections to lack of notice which, in this case, was even inferior to that which was rejected as inadequate in *Jones v. Flowers* cited above. Chief Justice Roberts at the very beginning of the opinion writes "**Before** [emphasis added] a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner 'notice and opportunity for hearing appropriate to the nature of the case.'" *Jones v. Flowers*, 164 L.Ed.2d. at 423. Requiring notice "before" selling property for unpaid taxes necessarily therefore makes notice a jurisdictional prerequisite. Constitutionally inadequate notice to the owner of a property sold at a tax foreclosure is a jurisdictional defect. *Benoit v. Panthaky*, 780 F.2d 336, 339 (3rd Cir. 1985). This jurisdictional concept applies to statutory notice requirements as well. *In Re: Sienkiewicz*, 900 F.2d 206, 208 (9th Cir. 1990),

In Re: Foreclosure of liens, 922 P.2d 73, 76 (Wash. 1996), *Van Raben Homes Inc. v. Dakota View Estates*, 546 N.W.2d 843, 847 (N.D. 1996). This jurisdictional defect is not waived by failure to redeem. *Van Raben Homes Inc.*, 546 N.W.2d at 846-847. In such circumstances the tax sale and tax deed are void. *.In Re: Foreclosure of Liens*, 922 P.2d at 76, *In Re: Sienkiewicz*, 900 F.2d at 208, (see also *F.D.I.C. v. Lee*, 130 F.3d 1139, 1143 (5th Cir. 1997) holding tax sale of property void because sheriff's failure to give statutorily required notice to and obtain consent of F.D.I.C.). The statute of limitations for an action to set aside a tax sale will not run for a sale conducted without constitutionally adequate notice. *Grobien v. Lombardy*, 765 F.Supp 856, 859 (D.Virgin Islands 1991)(upholding delay of 6 years in challenge to tax deed). These authorities teach that the arbitrary statutory deadlines imposed by the legislature and Indiana Court of Appeals do not remedy the due process violation occasioned by the failure of notice and do not trump Splittorff's due process right to notice.

Splittorff's challenge to the jurisdiction of the tax sale Court to issue the order for issuance of tax deed was also inherent in his allegation that the order and resulting tax deed are null and void. A claim that a judgment is void necessarily implicates an attack on the trial court's personal or subject matter jurisdiction. *Dusenberry v. Dusenberry*, 625 N.E.2d 458, 461-462 (Ind.Ct.App. 1993). In this matter, the

Court of Appeals has made an exception for aggrieved owners of properties sold at tax sale.

The record in this matter itself demonstrates the absurdity of the Indiana Trial Court's and the Indiana Court of Appeals' presumption of waiver of Splittorff's constitutional rights. The Trial Court and Indiana Court of Appeals apparently believe the illogical proposition that Splittorff, at a time when his property could be redeemed for a few hundred dollars, sat idly by and knowingly, willingly did nothing instead electing to litigate this matter all the way to the United States Supreme Court after the fact. The fact that Splittorff has so vigorously contested this matter all the way up to this honorable Court and the fact demonstrated by the record that Splittorff paid Warrick County more than $11,000.00 from August, 2000 through September 2003 for two properties on which the total tax bill was less than $800.00 per year for both, shows that Splittorff has been ready, willing and able to pay the taxes and would have but for the County refusing to send bills and notice to his correct address and selling the property out from under him

C Indiana Trial Court and the Indiana Court of Appeals Rendered a Portion of the Indiana Tax Sale Statute, Specifically I.C. 6-1.1-25-4.6(h), Unconstitutional as Being Violative of Splittorff's Procedural Due Process and Equal Protection Rights.

The Indiana Trial Court and the Indiana Court of Appeals rendered a portion of the Indiana Tax Sale Statute, specifically I.C. 6-1.1-25-4.6(h), unconstitutional as being violative of Splittorff's procedural due process and equal protection rights by, among other things, holding that it strictly limited Splittorff, as one whose property has been sold at tax sale to the sole remedy of a sixty (60) day window of time to take an appeal, solely directly from issuance of the tax deed while affording other litigants broader appellate rights.

On page 6 of the opinion the Indiana Court of Appeals essentially held that, irrespective of what debacle had transpired leading to the issuance of a tax deed, I.C. 6-1.1-25-4.6(h) strictly limits one whose property has been sold at tax sale to the sole remedy of a sixty (60) day window of time to take an appeal, directly from issuance of the tax deed. This also renders the statute unconstitutional on equal protection grounds. Having created appellate remedies the State may not constitutionally arbitrarily deny them to a particular class of litigants. *Lynk v. LaPorte Superior Court, No. 2,* 789 F.2d 554, 565 (7th Cir. 1986), *Jones v. State of Michigan,* 525 F.Supp. 636, 641 (S.D.Mich. 1981)(Aff'd 705 F.2d 454), *Able v. Bacarisse,* 131 F.3d 1141, 1143 (5th Cir. 1998), *Adsani v. Miller,* 139 F.3d 67, 76-77 (2nd Cir. 1998)(arbitrary denial of appeal is also due process violation).

There are various ways in which the absolute requirement that an aggrieved landowner take a direct appeal from the order for issuance of tax deed within sixty (60) days substantially narrows if not denies such a landowner an effective appellate remedy. Pursuant to Indiana Trial Rule 60(B), a Trial Court may relieve a party from an entry of default, final order or final judgment for mistake, surprise, or excusable neglect. *Darling v. Martin*, 827 N.E.2d 1199, 1202 (Ind.Ct.App. 2005)(R'hrg.Den.). Faulty process whereby a party fails to receive actual notice may constitute neglect, mistake or surprise to support relief from judgment. *Id.* Pursuant to Trial Rule 60(B) the motion must be filed within one year. The constraints of I.C. 6-1.1-25-4.6(h) makes an exception for landowners' whose property has been sold at tax sale who are limited to a direct appeal initiated within sixty (60) days.

As noted above, Splittorff had taken the position that the order for issuance of a tax title deed was void. The Indiana Court of Appeals in this matter relied upon two of its contradictory holdings in upholding the tax sale of Splittorfff's property (Appendix p. 11). It cited authority that an allegation that a tax deed is void is subject to the narrow constraints of I.C. 6-1.1-25-4.6(h). *B P Amoco Corp. v. Szymanski,* 808 N.E.2d 683, 690 (Ind. Ct. App. 2004) ("Since an appeal to a tax deed can be filed through either an independent action or a motion pursuant to T.R. 60(B), both remedies are subject to the same sixty-day time frame as

stipulated in the current I.C. 6-1.1-25-4.6(h)[.]"). On the other hand it cited authority that an exception to the sixty-day limit "exists where a motion for relief from judgment alleges a tax deed is void due to constitutionally inadequate notice, in which case an appeal must be brought within a reasonable time rather than within sixty days." *Diversified Invs., LLC. v. US Bank, NA*, 838 N.E.2d 536, 545 (Ind. Ct. App. 2005)(trans. denied). Both of these approaches put owners of properties sold at tax sale in a decidedly worse position than other litigants. In non-tax sale cases, the requirement that motion for relief from judgment be filed within a "reasonable time" does not apply to a claim that a judgment is void. *Collins v. Collins*, 805 N.W. 2d 410, 413-414 (Ind.Ct.App. 2004). Void judgments can be attacked directly or collaterally at any time. *Bowyer Excavating Inc. v. Commissioner, Indiana Department of Environmental Management*, 671 N.E.2d 180, 183-184 (Ind.Ct.App. 1996) (Trans. Den.). Consequently, whichever of the contradictory holdings of the Indiana Court of Appeals is applied, owners of property sold at tax sale have much fewer and narrower remedies to challenge the judgment and tax deed. Arbitrary and irrational discrimination violates equal protection clause even under the most deferential standard of review. *Goshtasby v. Board of Trustees University of Illinios*, 141 F.3d 761, 771 (7th Cir. 1998). This statutory discrimination against owners of properties sold at tax sale violates the equal protection claus .

I.C. 6-1.1-25-4.6(g) creates a presumption that a tax deed is valid. By placing such an onerous burden on a landowner challenging the sale of his property at tax sale, the approach taken by the Indiana Court of Appeals in this case effectively renders this an irrebutable, conclusive presumption by making the presumption practically impossible to rebut. A statute which creates a presumption which operates to deny a fair opportunity to rebut it is a due process violation. *N.L.R.B. v. Heyman,* 541 F.2d 796, 801 (9th Cir. 1976). Consequently, the statute, at least as applied here, is violative of procedural due process.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

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